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by
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Introduction

For many years it has been conventional historiographical wisdom that a radical change in the interpretation of the Constitution's most significant clauses dealing with political economy—the Commerce,[1] Contracts,[2] and Due Process Clauses[3]—took place in the years between 1937 and the close of the Second World War. This change is widely known as the "constitutional revolution" of the New Deal period. One historian, noting that between 1937 and 1946 the U.S. Supreme Court reversed thirty-two of its previous decisions, primarily in political economy cases, has asserted that in 1937 the Court "began a revolution in jurisprudence that ended, apparently forever, the reign of laissez-faire and legitimated the arrival of the Leviathan State."[4]

At one level that assertion seems incontrovertible. For example, by the 1940s, the Court had vitiated the use of the Contracts Clause as a barrier against legislation "impairing the obligation" of contracts in existence before the legislation's passage.[5] It had tacitly granted Congress nearly unlimited power to regulate commerce and obliterated the established doctrinal line between "direct" and "indirect" effects of an economic activity on interstate commerce.[6] Further, it had ceased to treat the Due

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1. U.S. CONST. art. I, § 8, cl. 3.
2. U.S. CONST. art. I, § 10, cl. 1.
3. U.S. CONST. Amendments 5 and 14.
4. WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 233, 236 (1995).
5. *See* Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-46 (1934).
6. *See* United States v. Darby, 312 U.S. 100, 119-23 (1941); Wickard v. Filburn, 317

Process Clauses as major barriers to redistributive social and economic legislation, in the process abandoning the long-standing jurisprudential distinction between "general" and "partial" legislation.[7]

The questions I address in this Article do not center on whether a "constitutional revolution" occurred in the New Deal period, but rather center on the form that revolution took, and why the revolution occurred. Here one encounters the remnants of a conventional historiographical explanation for the "revolution," which locates it in the economic dislocations and political realignments of the 1930s and the Court's pragmatic response to those developments. The conventional explanation assumes that the "revolution" was externally produced. It allegedly was engendered by the sharply critical public reaction to the Court's initial resistance to New Deal legislation seeking to regulate the economy, a reaction that manifested itself in the Roosevelt Administration's 1937 proposal to change the size of the Supreme Court.[8] The conventional explanation also assumes that the "revolution" was historically inevitable in that the jurisprudential positions advanced by the Court to buttress its initial opposition to the New Deal were so outmoded and so inattentive to the conditions of life in America in the 1930s, that they could not have been maintained much longer even had the Court not experienced any direct political pressure.[9]

Although that conventional explanation is already arguably in tatters, it seems appropriate to set it forth before attempting a further critique of it.[10] The salient questions for those who have subscribed to an externalist explanation of the "constitutional revolution" have centered on the political and economic features of American life when the "revolution" came into being and on the Court's responsiveness to those features. The account proceeds as follows. The American economy underwent a severe dislocation in the 1920s, producing among other things, a political realignment. Traditional conceptions of the role of government, especially

U.S. 111, 120-25 (1942).

7. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391-400 (1937).

8. This theme is emphasized in LEUCHTENBURG, *supra* note 4, at 82-162.

9. This position is captured in a quotation from Robert G. McCloskey's THE AMERICAN SUPREME COURT 175, 178 (Daniel J. Boorstin ed. 1960):

> The depression, and the New Deal which was its reflex, were forces too cosmic for those Canutes to withstand. Finally, the waves dislodged even the partial and contingent grip on economic affairs that the judiciary had once enjoyed. . . . [T]he extreme negativist position of 1935-36 was forsaken, as it had to be. . . .

10. *See* BARRY CUSHMAN, THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (forthcoming 1998) [hereinafter CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION]. When Cushman's manuscript appears in book form, it will be titled RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION. For an earlier statement of Cushman's critique of the conventional explanation, *see* Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994) [hereinafter Cushman, *Rethinking the New Deal Court*].

the role of the federal government, proved inadequate to deal with the depressed economy. New responses, featuring much greater federal regulation of economic activities, were advanced by the Democratic party under Roosevelt, whose composition and constituencies were themselves products of the times. When the constitutionality of those responses was challenged, the Supreme Court's existing jurisprudence set up barriers to implementing the responses.

The result was a series of Court decisions crippling the New Deal's early legislative initiatives, and triggering public revulsion against the Court. Buoyed by a landslide victory in the 1936 election, Roosevelt attempted to identify the Court as isolated from contemporary conditions and its justices as subscribing to outmoded interpretations of the Constitution. He sought to implement this view of the Court in his 1937 Court-packing plan, providing for the appointment of additional justices if a sitting justice declined to retire at the age of 70. Being political actors, the justices realized that in order to retain the Court in its existing form they would need to modify their attitude toward New Deal legislation, and after 1937 they did so, producing the "constitutional revolution."[11]

As structured, this explanation makes no serious effort to analyze the language of the Court's opinions during the period of the "constitutional revolution." It gives only cursory attention to the justices' rhetorical justifications for their initial opposition to or their subsequent legitimation of New Deal regulatory measures. There are two reasons for this failure to give close attention to the Court's opinions. One is that the account proceeds from a behaviorist model of judging, in which the rhetoric of judicial reasoning is treated as mainly a smokescreen for political intuitions and convictions, which are the "real" bases for decisions. The other is that because the overwhelming number of commentators who constructed the conventional explanation of the "constitutional revolution" approved of the thrust of that "revolution," applauded an increased governmental regulatory presence in the economy, and found the constitutional basis of the Court's resistance to New Deal legislation incomprehensibly archaic, these commentators did not feel it necessary to give more than cursory attention to the "reactionary" jurisprudential attitudes identified with opponents of early New Deal legislation.[12]

11. This account, in a less caricatured version, has been made as recently as in LEUCHTENBURG, *supra* note 4, at 231-36.

12. The conventional explanation originated in the late 1930s and early 1940s, with such works as EDWARD S. CORWIN, COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT (1938); EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. (1941); BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW (1942); and ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS (1941). It persisted through the 1950s, 1960s, and 1970s. *See* ALPHEUS THOMAS MASON, HARLAN FISKE

Had those commentators investigated the rhetoric of the Court's opinions on constitutional issues affecting government and the economy around the time of the "constitutional revolution," they would have found the sources of a quite different explanation of that development. First, they would have found a constitutional analysis in which contemporary social and political issues were reconfigured to take on particularistic legal meanings, meanings that are not easily rendered in conventional political labels.[13]

They would also have found a set of established interpretive principles, doctrines, and analogies within the analytical discourse of early twentieth century constitutional jurisprudence that existed relatively independently of the external context in which the Supreme Court made decisions in the 1930s. They would have come to realize that the principal questions Supreme Court justices asked themselves, when presented with a "novel" issue of constitutional interpretation caused by a pressing contemporary concern, centered on where the issue could be located within their established analytical discourse. Seen from the justices' perspective, the issues coming to the Court were not so much social issues as issues in legal interpretation, issues that they tried to characterize in the terms of familiar jurisprudential categories.[14]

STONE: PILLAR OF THE LAW (1956); MCCLOSKEY, *supra* note 9; and PAUL MURPHY, THE CONSTITUTION IN CRISIS TIMES, 1918-1969 (1972). It has even continued in some volumes that appeared in the 1980s, such as PETER H. IRONS, THE NEW DEAL LAWYERS, 272-89 (1982). It remains in unreconstructed form in a recent 1995 work. *See* LEUCHTENBURG, *supra* note 4, at 82-162, 213-36. A modification of the unreconstructed account, relying on it but questioning it at the same time, can be found in Michal R. Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 TEX. L. REV. 67, 102 & n.247 (1983).

Meanwhile, some recent revisionist work has begun to question the conventional explanation around the edges, and, as noted, Barry Cushman has attacked it head-on. *See* Michael Ariens, *A Thrice Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 635-51 (1994); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV 1891, 1935-82 (1994). Cushman's STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, contains versions of several of Cushman's earlier articles, such as *A Stream of Legal Consciousness: The Current of Commerce Doctrine from* Swift *to* Jones & Laughlin, 61 FORDHAM L. REV. 105, 160 (1992) [hereinafter Cushman, *Stream of Legal Consciousness*]; *Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow-Dog Contract*, 1992 SUP. CT. REV. 235, 293 [hereinafter Cushman, *Doctrinal Synergies and Liberal Dilemmas*]; and Cushman, *Rethinking the New Deal Court*, *supra* note 10, at 237-61. In my view, the appearance of Cushman's manuscript in book form will signal the collapse of the conventional explanation of the "constitutional revolution."

13. Cushman's work illustrates this point through a careful analysis of the Court's early twentieth century Commerce Clause and Due Process Clause opinions. *See* CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, manuscript at 398-430.

14. Cushman has also sketched out this dimension of the Court's early twentieth century Commerce Clause and Due Process Clause jurisprudence. *See id*; Cushman, *Stream of Legal Consciousness*, *supra* note 12; Cushman, *Doctrinal Synergies and Liberal Dilemmas*, *supra* note 12; Cushman, *Rethinking the New Deal Court*, *supra* note 10.

Finally, they would have found the existence of a "lost" attitude toward constitutional interpretation itself, an attitude that is the focus of this Article. That attitude toward interpretation, and the methodology accompanying it, was almost entirely abandoned by the Supreme Court by the early 1940s, but the very abandonment of the attitude and methodology has made it more difficult to reconstruct. This has led to a tendency on the part of mid- and late-twentieth century commentators to ignore the reasoning of cases identified with the "constitutional revolution," especially the rhetoric of justices opposing doctrinal change. If one returns to that rhetoric, however, the "lost" attitude can be found intact.

The attitude can be captured in a jurisprudential proposition animating much of the resistance to New Deal legislative experimentation: the proposition that the Constitution was not designed to change with time. Its principles were foundationalist and thus its "meaning" fixed. Its structure and language were not altered by events, rather they "accommodated" events. Events were seen as precipitating restatements of fundamental constitutional principles.

The "constitutional revolution" of the 1930s was not only a doctrinal revolution but an interpretive revolution. As an interpretive revolution, it altered the jurisprudential framework in which constitutional decisions on government and the economy were set. More fundamentally, it altered the professional function of the judge in constitutional interpretation. Even more fundamentally, it altered the process by which "permanent" legal texts, of which the Constitution was the cultural exemplar, were read in American jurisprudence. It altered the meaning of constitutional adaptivity.

The constitutional revolution, as an interpretive revolution, also had significant practical ramifications. Prior to the late 1930s, Supreme Court justices, in their roles as interpreters of the Constitution, were seen as guardians of fundamental constitutional principles, with many of these principles seen as barriers against legislative excesses. Since then, judges have been seen, at least in the realm of political economy, as partners with legislatures to ensure that the Constitution is responsive to changing economic and social conditions. An important function of judges in constitutional cases affecting government and the economy has been to implement an idea that became orthodoxy for the first time during the period of the "constitutional revolution": the idea of the "living Constitution." As a constitutional rubric, that idea signified an altered view of the meaning of constitutional adaptivity. The emergence of that view was at the very center of the transformation in constitutional interpretation that took place during the New Deal period.[15]

15. The phrase "living Constitution" has become so commonplace in late twentieth century constitutional discourse that its comparatively recent historical origins may be overlooked. On

I. The Origins of the "Living Constitution" Rubric

A. A Methodological Overview

I will show that the "constitutional revolution" is best understood as an interpretive revolution through looking at two closely related dimensions of constitutional jurisprudence in the late 1930s and 1940s, neither of which has been given much attention by the conventional externalist account. One dimension has begun to be treated by revisionist critics of the conventional account: the doctrinal discourse of Supreme Court justices addressing constitutional issues in political economy cases. I shall defer my treatment of that area, which builds on the work of others, and my treatment of cases will be selective.[16]

The other dimension, which is my principal focus, is rhetoric in both cases[17] and in scholarly literature addressing the role of the Constitution in American culture. In particular, I investigate rhetorical characterizations of the nature of constitutional interpretation and of the relationship of the Constitutional text to perceived external change in the realm of political economy: rhetoric directed toward the question of constitutional adaptivity. Examining that rhetoric discloses an alteration in the domi-

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the recent ubiquity of the phrase, see William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 693-95 (1976).

In my exploration of the historical origins of the phrase I profited from an unpublished paper by Howard Gillman presented to the Western Political Science Association. Howard Gillman, The Problem of Political Development for Constitutional Theory: The Collapse of Foundationalist Constitutionalism and the Origins of the Concept of the Living Constitution (April 1995) (on file with the author and Hastings Law Journal) [hereinafter Gillman, Problem of Political Development]. I am indebted to Professor Gillman for first drawing my attention to several of the sources I discuss in connection with the debate over the meaning of constitutional adaptivity in the 1920s and 1930s. Although Professor Gillman's explanation of the significance of that debate differs from the explanation I advance in this Article, we both recognize the significance of the episode in an intellectual history of twentieth-century constitutional interpretation that culminated in the "constitutional revolution."

Several additional works addressing issues in twentieth-century constitutional history, most prominently MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 219-54 (1986), demonstrate an awareness of many of the sources I discuss in connection with the "living Constitution" rubric. Nonetheless, so far as I am aware, Professor Gillman's paper represents the first sustained effort to connect those sources to the "constitutional revolution" itself.

16. *See infra* Part I.C.

17. The term "commentary" is typically separated from "cases." I have retained that separation for convenience, but in one sense it is an artificial one for my purposes. I am investigating rhetorical examples of an attitude toward interpretation made by both "commentators" and judges. When made by judges, such statements often are not intended to have precise doctrinal significance: they are "metadoctrinal," or "predoctrinal." I think it obscures their significance to call them "doctrine" merely because they are formulated by judges in the context of cases.

nant image of the Constitution during the period of the "constitutional revolution," from that of a timeless document embodying fundamental precepts of American government to that of a "living" document whose textual provisions were capable of accommodating the constantly changing features of twentieth century American culture.

I conclude that with the emergence of the idea that the Constitution was a "living" document came a potentially radical constriction in the role of judges as constitutional interpreters, at least in the realm of political economy.[18] Judges had previously been deemed the primary architects of the Constitution as a timeless repository of fundamental wisdom: as "countermajoritarian" or antimajoritarian forces in the American system of government. The new conception of the Constitution questioned the degree to which judges as members of an unelected elite could serve as effective interpreters of the majoritarian policies of a democratic society, policies to which a "living" Constitution should conform.

All of the features of the interpretive revolution that will subsequently be set forth—the abandonment of categorist methodology in cases involving government and the economy, the emergence of judicial deference as an approved stance for the Court in reviewing regulatory and distributive legislation, the development of prudentialist and pragmatic judicial readings of constitutional language, and above all the idea that the meaning of the Constitution is supposed to change with time—can be associated with an altered epistemological sensibility, one that attributed much greater causal significance to the purposive activities of human actors as shaping forces in the universe. Once judges and commentators came to believe that the flow of time could be linear, even progressive, rather than cyclical, that events need not repeat themselves, and that humans could alter or reduce the power of supposedly inexorable external forces in the universe, the idea of the Constitution as an embodiment of permanent truths became far less compelling.[19]

18. One of the paradoxical features of the emergence of this constricted role for judges as constitutional interpreters was that it was not taken to apply to the realm of free speech. For an extended discussion of this paradox, see G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299 (1996) [hereinafter White, *First Amendment Comes of Age*].

19. This is another in a series of Articles in which I have sought to explain the significant changes that took place in American law and jurisprudence during the period between World War I and World War II by setting those changes in the framework of changing patterns of epistemology in American culture during those years. My analysis rests on two fundamental propositions: first, that what I call a "premodernist" consciousness about causal attribution in the universe and human governance persisted in American jurisprudence much later than has commonly been supposed; and second, that a "modernist" consciousness about causal attribution and human governance did not become orthodoxy among elite policymakers until the New Deal period. For definitions of "premodernist" and "modernist" epistemology, see G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70

In short, I suggest that the emergence of modernist consciousness as an epistemological orthodoxy rendered obsolete an older conception of constitutional adaptivity and an associated theory of the judge's role in constitutional interpretation.

B. The Emergence of the "Living Constitution" Rubric: Commentary in the 1920s[20]

By the 1920s, commentators had begun to articulate a conception of the Constitution as a "living" document, one whose meaning was capable of changing with time. The phrase "living Constitution," as it surfaced in commentary, combined two dimensions of constitutional interpretation. One, the explicit focus of the commentary, was the dimension of constitutional adaptability. Ascribing adaptability to the Constitution had been a time-honored practice in American constitutional jurisprudence, dating at least to John Marshall's celebrated dictum in *McCulloch v. Maryland* in which he described a Constitution as intrinsically capable of being "adapted to the various *crises* of human affairs."[21] By the 1920s, that sense of adaptability was being used by some jurists to buttress the argument that the fundamental principles of the Constitution *did not* change with time. This argument was faithful to Marshall's meaning of adaptability: the equivalent of a restatement of first principles in new contexts.[22] Others, however, took adaptability to mean something quite different: that constitutional principles themselves could be modified to suit the demands of contemporary life. The second meaning of adaptability signified a radically different set of assumptions about the nature of constitutional interpretation.

The other dimension of the "living Constitution" rubric was that the Constitution was to be interpreted by human beings. This was the less explicit, more fundamental, and more radical dimension. A staple of traditional constitutional jurisprudence was the distinction between a government of laws and a government of men. American constitutional republicanism was an embodiment of the former type of government, as evidenced by an enduring written Constitution. In fact, the reason that constitutional principles were to be taken as fundamental and unchanging

N.Y.U. L. REV. 573, 579 n.11 (1995) [hereinafter White, *Canonization of Holmes and Brandeis*]; White, *First Amendment Comes of Age*, *supra* note 18, at 303-06; G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1, 14-16, 24-26 (1997).

20. Some of the sources discussed in this section were first called to my attention in Howard Gillman's unpublished paper. *See* Gillman, Problem of Political Development, *supra* note 15; *see also* KAMMEN, *supra* note 15, at 219-33, 251-54.

21. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

22. *See* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 21-22 (1976) [hereinafter WHITE, AMERICAN JUDICIAL TRADITION].

was because otherwise America would cease to be a government of laws. The distinctions between "the will of the law" and "the will of the Judge," as Marshall put it in another of his famous opinions,[23] or between law declaration and lawmaking, or between "interpreting" and "amending" the Constitution, were premised on the conviction that the Constitution was a discernible body of supreme law binding on those who interpreted it, rather than, as Charles Evans Hughes put it in 1907, "what the judges say it is."[24]

Despite repeated judicial pronouncements that courts "make no laws[,] . . . establish no policy, [and] . . . never enter into the domain of public action" because "[t]heir functions . . . are limited to seeing that popular action does not trespass upon right and justice as it exists in written constitutions and natural law,"[25] an increasing number of early twentieth century commentators began to assert that laws were made by humans and thus the distinction between a government of laws and a government of men was potentially meaningless.[26] This assertion can be readily associated with the surfacing of modernist epistemological premises among intellectuals in the first decades of this century, because a central element of modernism was the transfer of causal attribution in the universe from inexorable external forces to human will. The assertion of the primacy of human-centered causation, at least in the realm of law, was highly threatening and sharply contested in that period.

As the Supreme Court began to confront New Deal legislation in the 1930s, those who found that the legislation subverted constitutional principles continued to affirm the inexorability of external causal phenomena. John W. Davis, in the course of attacking New Deal experiments in economic regulation in 1934, said, "Who can doubt that there are natural laws in the social and economic as well as the physical worlds, and that these cannot be overridden without courting disaster?"[27] Thirteen years earlier, U.S. Supreme Court Justice George Sutherland had given a speech before the New York State Bar Association in which he made the same point more elaborately:

> There is nothing more unfortunate in governmental administration than a policy of playing fast and loose with

23. Osborn v. U.S. Bank, 22 U.S. (9 Wheat.) 738, 866 (1824).

24. Charles Evans Hughes, Speech Before the Elmira Chamber of Commerce (May 3, 1907), *in* CHARLES EVANS HUGHES, ADDRESSES AND PAPERS 133, 139 (1908).

25. Justice David Brewer, The Movement of Coercion, Address Before the New York State Bar Association (1893), *quoted in* WHITE, AMERICAN JUDICIAL TRADITION, *supra* note 22, at 145.

26. Alternative readings of several of the sources treated in this section can be found in KAMMEN, *supra* note 15, at 224-38, and Gillman, Problem of Political Development, *supra* note 15.

27. *Text of J.W. Davis's Attack on the New Deal*, N.Y. TIMES, Feb. 28, 1934, at 14.

> great economic and political principles which have withstood the strain of changing circumstance and the stress of time and have become part of our fundamental wisdom . . . . Conditions which such a principle governs may change—indeed, in this forward moving world of ours, they must change—but the principle itself is immutable . . . . [T]here are certain fundamental social and economic laws which are beyond the power, and certain underlying governmental principles, which are beyond the right of official control, and any attempt to interfere with their operation inevitably ends in confusion, if not disaster.[28]

In the 1920s, the appearance of two books on the Constitution demonstrated that the jurisprudence of constitutional interpretation was in considerable ferment, and that the fissures between opposing camps ran very deep. The first book was *The Constitution of the United States* by James M. Beck, Solicitor General of the United States.[29] Originally based on lectures delivered at Gray Inn, London, in June of 1922, the book appeared in numerous editions.[30] The book was intended for lay audiences and had sold over 50,000 copies by 1928, thanks in part to subsidies by the Treasury Department, the Victor Talking Machine Company, and the National Security League.[31]

Beck's treatment of the Constitution, which he described as a document embodying "a great spirit" of "conservative self-restraint,"[32] struck a deep nerve among some of his contemporaries. The New York lawyer William Nelson Cromwell wrote Beck that he had revealed to him "the wonders of that inspired document, just as men of genius are constantly revealing to use the wonders of the Scriptures."[33] President Warren Harding called it "an educational effort which fittingly complements the patriotic work of the League [of Nations],"[34] and President Calvin Coolidge wrote a foreword to the Victory Talking Machine Company's special edition, designed for schools and libraries, stressing that reverence for the Constitution was the equivalent to support for "a government of

28. *Address by George Sutherland*, 44 REP. N.Y. ST. BAR ASS'N 262, 263, 265 (1921).

29. JAMES M. BECK, THE CONSTITUTION OF THE UNITED STATES (1924 ed.).

30. The book appeared in a 1922 English edition, a 1923 American edition, an expanded 1924 edition, a paperback version in 1925, and an abridged version in 1927.

31. MORTON KELLER, IN DEFENSE OF YESTERDAY: JAMES M. BECK AND THE POLITICS OF CONSERVATISM, 1861-1936 157-59 (1958).

32. BECK, *supra* note 29, at 151-52.

33. Letter from William Nelson Cromwell to James Beck (Mar. 23, 1924), James M. Beck Papers, Firestone Library, Princeton University, *quoted in* KELLER, *supra* note 31, at 159.

34. JAMES M. BECK, THE CONSTITUTION OF THE UNITED STATES vii (1923 ed.).

law."[35] Senator William E. Borah, in a 1924 letter, said that he wished Beck's book "could be in the hands of every young person in the United States," because "God knows how dearly we need a constitutional revival."[36] Even H.L. Mencken referred to *The Constitution of the United States* as "an excellent piece of work."[37]

For progressive modernists of the time, such as Felix Frankfurter, Walter Lippmann, and Harold Laski, Beck's book embodied the kind of indiscriminately pious devotion to constitutional "principles" that they felt was such a deterrent to enlightened judicial decisionmaking. In two reviews of successive editions of *The Constitution of the United States*, Thomas Reed Powell, known for his penetrating critiques of traditionalist rhetoric in Court opinions, turned his powers of ridicule on Beck.[38] In the first of the reviews he likened Beck's work to a "prayer book," designed to elicit a "mystical adulation of the Constitution in the pious faith that it contains in itself the saving grace that will shield the interests of the worshippers from the ambitions of those whose interests are adverse." Noting that Beck had likened the Constitution to a floating dock, remaining secure in its moorings while adjusting to the tides, Powell said that Beck's "idea seems to be that while [the Constitution] does not move forward or backward, it jiggles up and down."[39] His second review opened with the sentences, "The new book which Mr. Beck has written about the Constitution is a very different kind of book. You can read it without thinking."[40]

Powell's was not the only public criticism of Beck that appeared. *The Nation*, the *New York Times*, the *New York Tribune*, the *New York Evening Post*, and the *New York Call* also voiced dissatisfaction with what they took to be his indiscriminate worship of the past, with the *Times* calling him one of the "high priests" of constitutional fetishism.[41]

35. Calvin Coolidge, *Foreword* to BECK, *supra* note 29, at *v*, *vi*.

36. Letter from William E. Borah to James M. Beck (Dec. 4, 1924), *quoted in* KELLER, *supra* note 31, at 159.

37. Letter from H.L. Mencken to James M. Beck (Dec. 12, 1924), *quoted in* KELLER, *supra* note 31, at 159.

38. Thomas Reed Powell, *Constitutional Interpretation and Misinterpretation*, NEW REPUBLIC 297 (1923) (reviewing JAMES M. BECK, THE CONSTITUTION OF THE UNITED STATES (1922 ed.)) [hereinafter Powell, *Constitutional Interpretation and Misinterpretation*]; Thomas Reed Powell, *Constitutional Metaphors*, NEW REPUBLIC 314 (1925) (reviewing JAMES M. BECK, THE CONSTITUTION OF THE UNITED STATES (1924 ed.)) [hereinafter Powell, *Constitutional Metaphors*]. The second review provoked Fred Rodell, a Yale law professor who generated his own reputation for vitriolically amusing reviews, to call it "my favorite review of all time." Letter from Fred Rodell to Thomas Reed Powell (June 1936), *quoted in* KAMMEN, *supra* note 15, at 249.

39. Powell, *Constitutional Interpretation and Misinterpretation*, *supra* note 38, at 297-98.

40. Powell, *Constitutional Metaphors*, *supra* note 38, at 314.

41. *See* Boyqué Jean, *American Government*, THE NATION, 436, 436-37 (1923) (review-

The feature of Beck's work that particularly irritated his critics was his blithe conviction that the principles of the Constitution were timeless. The critics felt that Beck's principles bore a remarkable resemblance to "what conservative lawyers conceived [the Constitution] to be about 1901."[42]

Some of the reaction to Beck, who was closely identified with the center of the Republican party in the 1920s, was simple partisanship. But another theme of Beck's critics—his simple-mindedness—was more than just a reaction to his unsophisticated style of prose. The line of criticism embodied by Powell's reviews suggested that Beck's assertions about constitutional principles existing independent of the views of those charged with interpreting the Constitution amounted to jurisprudential naïveté.[43] His critics believed that by caricaturing the argument that America was a government of "laws" rather than "men," Beck had demonstrated its essential emptiness. Law was itself the creation of humans, taking on the character of its changing context and the changing theories of governance which accompanied that context.

From the perspective of his critics, Beck's theory of constitutional interpretation had confused permanence with fundamentality. They conceded that in the American system of government, the Constitution was a "fundamental" document, the ultimate source of legal authority. They granted that American republicanism presupposed the necessity for such a document because it was predicated on the people having consented to be ruled by some authority. They could understand that it was fundamental to a republican system of government that there be tacit agreement among "the people" as to the existence of a supreme governing document and a body, the Supreme Court of the United States, whose interpretations of it would be regarded as authoritative.

But Beck's critics asserted that judges, as constitutional interpreters, were not simply mouthpieces for preexisting legal principles. This was especially apparent in closely divided cases, where five Supreme Court justices thought a particular law could not be reconciled with the text of the Constitution, and was thus invalid, while four justices thought it was valid. In such cases one group of humans had made the law—the legislators who had drafted and enacted it—and another group had "unmade"

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ing JAMES M. BECK, THE CONSTITUTION OF THE UNITED STATES (1922)); William MacDonald, *Mr. Beck Draws an Indictment Against a Whole People*, N.Y. TIMES, Aug. 3, 1924 at 3 (reviewing JAMES M. BECK, THE CONSTITUTION OF THE UNITED STATES (1922)); KELLER, *supra* note 31, at 296 (noting the negative reviews of Beck's book appearing during 1923 in the *New York Tribune*, the *New York Evening Post*, and the *New York Call*).

42. Letter from Karl Llewellyn to Edward Corwin (Aug. 11, 1936), *quoted in* KAMMEN, *supra* note 15, at 249.

43. *See* Powell, *Constitutional Interpretation and Misinterpretation*, *supra* note 38; Powell, *Constitutional Metaphors*, *supra* note 38.

it—the five justices who concluded that it was unconstitutional. To equate the process of constitutional interpretation with the "discovery" of preexisting legal principles made no sense in such cases, for if one of the justices who found the law unconstitutional changed his view, the "meaning" of the Constitution would have been different.[44]

The above arguments were crystallized in a book appearing in 1927 entitled *The Living Constitution*, written by Howard Lee McBain, a professor at Columbia Law School.[45] Its purpose was to demonstrate that "judges are men . . . made of human stuff like the rest of us and sharing with us the common limitations and frailties of human nature," and that "[l]aws are man-made, man-executed, man-interpreted."[46] The distinction between a government of laws and a government of men was "absurd" to McBain.[47] "Laws," he maintained, "live only because men live and only to the extent that men will to have them live. Apart from men, a government of laws is a thing inert, a thing that is harmless because useless, a thing that has no existence outside the realm of imagination."[48] Thus, the Constitution could not be seen as "handed down on Mount Sinai by the Lord God of Hosts," but as "human means," revealing that "nothing that is human is infallible, and that governments, whatever their form, are only as moral as those who hold the throttle of power at the moment."[49]

C. Constitutional Adaptivity and the Interpretive Revolution: Two Paradigm Cases

The different views expressed by Beck and McBain with respect to the "meaning" of the Constitution and to the distinction between a government of laws and one of men framed a debate over the nature of constitutional interpretation that took place in the 1920s and 1930s. On one side of the debate were those who continued to deny that the meaning of the Constitution could change with time and continued to believe that judicial interpretation was not the equivalent of judicial lawmaking. On the other were advocates of a "living" Constitution, who saw the process of constitutional interpretation as organic and human-crafted.

Two types of exercises in constitutional interpretation by the Supreme Court were at the center of the debate. One set involved applications of constitutional provisions to circumstances that the framers could

44. *See, e.g.*, Thomas Reed Powell, *The Judiciality of Minimum-Wage Legislation*, 37 HARV. L. REV. 545, 545-46 (1924).

45. HOWARD L. MCBAIN, THE LIVING CONSTITUTION (1927).

46. *Id.* at 2.

47. *Id.* at 3.

48. *Id.*

49. *Id.* at 272.

not have contemplated, such as *Olmstead v. United States*.[50] There, federal agents installed wiretaps in the basement of bootlegger Roy Olmstead's office building and in the street near his home.[51] Based on the wiretaps, the agents secured evidence that helped to convict Olmstead for a violation of the Volstead Act, which prohibited the sale or manufacture of intoxicating liquors.[52] Olmstead challenged the conviction on the grounds that the wiretapping, which was undertaken without a search warrant, violated his Fourth Amendment protection against unauthorized searches and seizures.[53]

A five man majority of the Court, speaking through Chief Justice Taft, upheld the conviction.[54] The Fourth Amendment prohibited unreasonable searches and seizures of "persons, houses, papers, and effects," and the wiretaps had not been installed on any of Olmstead's property.[55] Thus, no trespass had taken place and a warrant was not required.[56] Justice Brandeis, in dissent, argued that "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."[57]

The fundamental interpretive issue in *Olmstead*, as noted, was whether a constitutional provision could be applied to cover a situation outside the consciousness of its drafters. The language "persons, houses, papers, and effects" in the Fourth Amendment suggested that its context was unauthorized trespasses onto property, and the framers had no inkling of the technology that produced electronic eavesdropping. In the late eighteenth century few mechanisms existed for invading the privacy of others except unauthorized trespasses. So the ultimate interpretive question in *Olmstead* was whether textual provisions of the Constitution, such as the Fourth Amendment, could be read as "adaptable" only in Marshall's sense, as linguistic skins that could be stretched but not stretched beyond recognition, or "adaptable" in a modern sense as terms of art for which later humans could substitute other terms. Taft, for the majority, read the Fourth Amendment as providing safeguards against only those unreasonable intrusions that invaded a citizen's person, home, papers, or effects. He suggested that although "the Fourth Amendment [is] to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty," that could not "justify enlargement of the language employed beyond the possible practical meaning of houses, per-

50. 277 U.S. 438 (1928).
51. *Id.* at 456-57.
52. *Id.* at 457.
53. *Id.* at 455.
54. *Id.* at 466.
55. *Id.* at 457, 466.
56. *Id.* at 466.
57. *Id.* at 478 (Brandeis, J., dissenting).

sons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight."[58]

Brandeis's dissent announced that the Constitution "must have a . . . capacity of adaptation to a changing world," and "its general language should not . . . be necessarily confined to the form that evil had . . . taken [to the framers]."[59] Because "[t]ime works changes, brings into existence new conditions and purposes," a constitutional principle, "to be vital[,] must be capable of wider application than the mischief which gave it birth."[60] This was an articulation of the modern version of adaptability.

The next set of troublesome cases brought the clash between advocates of a fixed Constitution and advocates of a "living" Constitution even more clearly into the open. This set was composed of cases where the language of a constitutional provision, coupled with its context, made the framers' intent abundantly clear, and yet adherence to that intent because of changed circumstances produced an extremely awkward policy outcome. *Home Building & Loan Association v. Blaisdell* [61] was such a case. It was one of the early signals of a forthcoming "constitutional revolution" in the realm of political economy.

The depressed economic conditions of the 1930s had resulted in a number of homeowners being unable to meet mortgage payments on their houses, with the result that many were threatened with foreclosure. Minnesota responded to this situation by passing "emergency" legislation that enabled courts to postpone deadlines for mortgage redemption.[62] In *Blaisdell*, a homeowner's deadline was extended under the statute, and the mortgagor sued to compel foreclosure, arguing that the statute was unconstitutional under the Contracts Clause of the Constitution,[63] which provides that "[n]o State shall . . . pass any . . . law impairing the Obligation of Contracts."[64]

The Contracts Clause of the Constitution was designed precisely to respond to the situation present in *Blaisdell*, where a legislature intervened to protect debtors against creditors. Prior to the framing of the Constitution, debtor relief laws, which postponed the time for payment of debts or altered the currency they could be paid in, had been common in the states. Some of the framers felt that this situation was deleterious to commercial development, and others were sympathetic to the interests of

58. *Id.* at 465.
59. *Id.* at 472 (Brandeis, J., dissenting) (*quoting* Weems v. United States, 217 U.S. 349, 373 (1910)).
60. *Id.* at 472-73 (Brandeis, J., dissenting) (*quoting Weems*, 217 U.S. at 373).
61. 290 U.S. 398 (1934).
62. *Id.* at 415-16.
63. *Id.* at 418-19.
64. U.S. CONST. art. I, § 10, cl. 1.

creditors. There was agreement that the Constitution should curb the opportunities of state legislatures to interfere with private contractual arrangements.[65]

In the course of the Court's development of Contracts Clause jurisprudence, it became clear that although debtor relief laws were invalid, the states retained power to vitiate certain contractual agreements, on grounds of public policy, such as those involving transactions to participate in illegal activity.[66] Despite this concession, the Contracts Clause remained an important barrier to legislative regulation as long as the sphere of state police powers remained relatively confined. By the time of the *Blaisdell* decision, however, the scope of the police power had become a central question of constitutional jurisprudence.[67]

Writing for the 5-4 majority of the Court, Hughes's opinion sustaining the Minnesota statute proceeded on the assumption that Contracts Clause cases had now become analogous to police power Due Process cases, exercises in "harmonizing the constitutional prohibition with the necessary residuum of state power."[68] That statement itself was interesting, because the Contracts Clause represented a much more explicit protection of private rights than the Due Process Clauses. But Hughes borrowed from Due Process analysis in formulating the Court's methodology in Contracts Clause cases, which he described as an inquiry into "whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."[69]

Hughes then described the altered economic conditions and altered perceptions about those conditions that formed the context of "emergency" measures such as that adopted by Minnesota:

65. *See* BENJAMIN F. WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 4-5 (1938).

66. *See, e.g.*, Stone v. Mississippi, 101 U.S. 814, 818-19 (1879) (upholding state law that invalidated corporate charters authorizing lottery enterprises); Manigault v. Springs, 199 U.S. 473, 483 (1905) (upholding state law that invalidated contract relating to damming of a navigable stream).

67. The emergence of the concept of the "police power" in nineteenth century constitutional jurisprudence is sketched in HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993) [hereinafter GILLMAN, THE CONSTITUTION BESIEGED]. *See also* CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, at 152-69, and Charles McCurdy, *The Liberty of Contract Regime in American Law*, *in* FREEDOM OF CONTRACT AND THE STATE (Harry Scheiber, ed., forthcoming 1997). I make use of these sources in a recent argument that Holmes's celebrated dissent in *Lochner v. New York* has been misunderstood. *See* G. Edward White, *Revisiting Substantive Due Process and Holmes's Lochner Dissent*, 63 BROOK. L. REV. (forthcoming 1997) [hereinafter White, *Revisiting Substantive Due Process*].

68. *Blaisdell*, 290 U.S. at 435.

69. *Id.* at 438.

> There has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.[70]

Thus it was clear that context, not fixed constitutional principles, would be controlling in *Blaisdell*. But what of the fact that the Contracts Clause was unambiguously designed to prevent the very legislative intervention being challenged in that case? What of the fact that the statute was a debtor relief law, however it was characterized, one by which the state was intervening to change the terms of preexisting contractual obligations? *Blaisdell* did not involve a constitutional provision where the framers had articulated a general principle, such as protection from government intrusion, without contemplating the particular circumstances to which that principle might be applied. It was a case in which the framers had articulated a principle (the state may not interfere with preexisting private contracts), having a particular context in mind (debtor relief laws), and that very context had occurred.

Hughes was thus squarely confronted between an interpretive theory of the Constitution that saw its meaning as fixed, albeit capable of adaptation, and an interpretive theory—the "living Constitution" theory—that treated the meaning of the Constitution as capable of radically changing with time. The result reached by the Hughes majority in *Blaisdell* could only mean that the Contracts Clause of the Constitution did not mean in 1934 what it had meant for the past 150 years. As Hughes put it:

> It is no answer . . . to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is *a constitution* we

70. *Id.* at 442.

> are expounding—a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[71]

In the above paragraph, instead of contrasting two interpretive theories of the Constitution, Hughes acted as if they were two ways of expressing the same theory. However, in traditional constitutional interpretation as it existed in the 1920s and 1930s, there was a world of difference between the two meanings of adaptability, between treating the Constitution's principles as enduring through adaptation to new conditions and treating those principles as changing in response to those conditions. Hughes was not merely suggesting in *Blaisdell* that the principle of protecting private contract-making from governmental interference was being applied to circumstances in which the social impact of mortgage foreclosures was wider than previously perceived. He was suggesting that the expanded social impact of mortgage foreclosures called for a rethinking of the principle itself. He was suggesting, in other words, that the Contracts Clause meant something different in the American economy of the 1930s from what it previously had meant.

A concurrence originally filed by Justice Benjamin Cardozo in the *Blaisdell* case illustrates that this was Hughes's meaning. In that concurrence, Cardozo had written as follows:

> The decisions brought together by the Chief Justice show with impressive force how the court in its interpretation of the contract clause has been feeling its way toward a rational compromise between private rights and public welfare. From the beginning it was seen that something must be subtracted from the words of the Constitution in all their literal and stark significance . . . . [A] promise exchanged between individuals was not to paralyze the state in its endeavor in times of direful crisis to keep its life-blood flowing.
>
> To hold this may be inconsistent with things that men said in 1787 when expounding to compatriots the newly written constitution. They did not see the changes in the relation between states and nation or in the play of social forces that lay hidden in the womb of time. It may be inconsistent with things that they believed or took for granted. Their beliefs to be significant must be adjusted to the world they knew.[72]

Eventually Cardozo withdrew his concurrence and joined Hughes's *Blaisdell* opinion.[73]

Justice Sutherland, dissenting in *Blaisdell*, had no difficulty identifying the novel character of Hughes's theory of constitutional interpretation. He declared:

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71. *Id.* at 442-43 (citations omitted).

72. WALTER F. MURPHY, ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 138 (1986). Cardozo's concurrence, which Justice Harlan Fiske Stone had apparently edited, was found in Stone's papers by Professor Alpheus Thomas Mason when Mason was working on his biography of Stone, *Harlan Fiske Stone: Pillar of the Law*. *Id.* at 138-39.

73. *Id.*

> A provision of the Constitution does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time. If the contract impairment clause, when framed and adopted, meant that the terms of a contract for the payment of money could not be altered . . . by a state statute enacted for the relief of hardly pressed debtors to the end and with the effect of postponing payment or enforcement during and because of an economic or financial emergency, it is but to state the obvious to say that it means the same now.[74]

In Sutherland's comments one can see the fundamental incompatibility of the two theories of constitutional interpretation being advanced in *Blaisdell*. However, if Sutherland is correct that the meaning of the Constitution does not fundamentally change, one encounters what contemporary commentators have called the "dead hand" overtones of the constitutional text.[75] "Dead hand" overtones arise where the framers of a constitutional provision had anticipated the very circumstance to which the provision should be applied, and the Framers's views are then accepted. In such instances, the policies of past generations control those of the present.

The "dead hand" overtones of the interpretive theory articulated by Sutherland in *Blaisdell* are instinctively repugnant to modern thinkers. But if one holds a different epistemology with a different conception of "law," the dead hand problem dissolves. Under that conception, "law" is a body of timeless rules and principles, reflecting inexorable truths in the universe. From this perspective, the Contracts Clause is merely a codification of the truth that humans enter society with certain inalienable rights, such as the right to make formal arrangements to transact their affairs (contracts), and government exists to secure those rights, not to infringe upon them. By including the Contracts Clause in the Constitution, the framers were not so much imposing their view of debtor-creditor relations on future generations as committing to written form some fundamental truths of political economy and government. That was all "law" was, a collection of such truths appearing in the form of doctrines, rules, and principles.

Once one adopted the assumptions of McBain's *The Living Constitution*,[76] however, the "dead hand" problem came to haunt any theory of constitutional interpretation that emphasized the "original intent" of the framers. If law was *made* by humans, it was not the equivalent of timeless, disembodied truth. Rather, it was the equivalent of the current policy preferences of lawmakers, including those who "interpreted" law rather than explicitly making it. The assumption that law was created by

74. *Blaisdell*, 290 U.S. at 448-49 (Sutherland, J., dissenting).
75. *See, e.g.*, Michael Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997).
76. *See* MCBAIN, *supra* note 45.

humans rather than a distillation of externally generated truths made the idea that constitutional principles had a fixed meaning problematic.

In his dissent in *Blaisdell*, Sutherland had argued that "[t]he defense of the Minnesota law [had been] made upon grounds which were discountenanced by the makers of the Constitution."[77] Because in the *Blaisdell* case that defense had been resurrected "by an appeal to facts and circumstances identical with those which brought it into existence," it was not acceptable.[78] To Sutherland and the other dissenters, accepting that defense required that "conditions which produced the rule may now be invoked to destroy it."[79] But for those who adopted Hughes's theory of constitutional interpretation, the important point was that humans had changed their mind about the cultural significance of those facts and circumstances. In light of the newly perceived social consequences of debt in America of the 1930s, the Contracts Clause had become less of an embodiment of fundamental principles of republican government and more of a barrier against efforts to alleviate the social costs of a depressed economy. Its meaning had changed, and humans were free to instill that meaning into law.

The idea of a "living Constitution," in which the meaning of the language could change to accommodate not only changed conditions but changed perceptions of the relationship of constitutional provisions to those conditions, was not without its own problems. Although it "solved" the "dead hand" problem, it introduced others. Foremost among them, for mid-twentieth century commentators, was the problem of finding appropriate justifications authorizing judicial interpreters of the Constitution to change its meaning. Judges from Marshall through Sutherland had responded to the question of judicial legitimacy by maintaining that they were simply declaring or adapting received constitutional wisdom; they were not "lawmakers" in the legislative sense. However, when the Supreme Court in *Blaisdell* explicitly rejected an interpretation of a constitutional provision in precisely the same circumstances in which that interpretation had been advanced, it was hard to imagine, in a twentieth century epistemological universe, what else its members were doing except making new law. Justices no longer appeared as officials charged with the duty of articulating preexisting first principles in a republic; the Constitution had become, to many observers, what judges said it was.[80]

77. *Blaisdell*, 290 U.S. at 472 (Sutherland, J., dissenting).

78. *Id.*

79. *Id.*

80. One might be inclined to think that judges adopting the "living Constitution" rubric in the 1930s were saying something different: that the Constitution was what Congress and state legislatures said it was. A posture of reflexive deference to the legislature on constitutional questions might not, after all, be inconsistent with a view of judicial lawmaking as a contradiction in terms. However, this line of reasoning has to cope with the expanded role of the Su-

D. The "Living Constitution" in the New Deal Years

Judicial legitimacy in a world in which judges were presumed to be a species of lawmaker was at the center of constitutional theory in the years after *Blaisdell*. In the 1930s, the clash between interpretive theories of the Constitution had not yet been resolved. However, little by little, the interpretive posture represented by Hughes in *Blaisdell* began to prevail. That development can be associated with a confluence of two trends, one taking place within the Court and the other external to it, in the world of commentary. These trends will be discussed in reverse order.

(1) Commentary in the 1930s[81]

Between the appearance of Beck's *The Constitution of the United States* and the mid-1930s, the question of the proper role of the Constitution in American society was a recurrent subject of academic debate. Discussion centered on two issues: whether the Constitution, given the altered conditions of modern America, had become "obsolete," and, if so, what should be done about it. On one side of the debate were commentators such as Beck and Charles W. Pierson, who in a 1926 book, *Our Changing Constitution*, took note of "the drift toward centralization" that was occurring in governmental policy and expressed concern that in "moving forward with conscious power toward the achievement of their aims," the American people would give insufficient attention to the constitutional legitimacy of centralizing policies.[82] Pierson stressed the Constitution's capacity to adapt to change, and insisted that experiments with centralization should have a proper constitutional basis, by which he meant a basis consistent with the traditional assumptions of republican government.[83] He suggested the slogan "Back to the Constitution" as a rallying cry for those who desired renewed attention to it.[84]

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preme Court in First Amendment cases and other "noneconomic liberty" cases from the early 1930s. For an extended discussion, see White, *First Amendment Comes of Age*, *supra* note 18, at 327-42. In this context the now reflexive citation of footnote four in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), can be seen as one of the earliest internalizations of the "living Constitution" rubric by a Court majority.

81. A number of the sources discussed and quoted in this section were first brought to my attention by Gillman's unpublished paper. *See* Gillman, Problem of Political Development, *supra* note 15. I have on some occasions selected passages from those sources that were also selected by Gillman. In such instances the quoted passages served my purposes as well as those of Professor Gillman, but he should be credited for pointing me in their direction. Some of the sources are also discussed and quoted in KAMMEN, *supra* note 15, at 248-54.

82. CHARLES W. PIERSON, OUR CHANGING CONSTITUTION 143 (1926).

83. *Id.* at 144.

84. *Id.* at 151.

On the other side were a variety of commentators who embraced one or another versions of the "living Constitution" theory. Some argued that the Constitution had become obsolete in the 1930s, and advocated amending its provisions or interpreting them out of existence.[85] Others embraced the "dead hand" critique, claiming, as Professor Jesse H. Holmes put it, that "[o]ur forefathers didn't know anything about a country of 120,000,000 people, with automobiles, trains, and radios."[86] Still others found the ideological presuppositions on which many constitutional provisions were grounded inappropriately elitist or libertarian for a modern democratic society.[87]

As late as 1936, the American Academy of Political and Social Science thought that the debate over the proper role of the Constitution was still sufficiently unresolved to devote a symposium to the topic. That symposium featured commentators who believed that the Constitution's greatest strength was its combination of permanent principles and adaptable language, and who worried about recent efforts to ignore its limitations on the power of the national government.[88] However, other commentators in the symposium openly endorsed the "living Constitution" perspective, with Charles Beard writing that "[s]ince most of the words and phrases dealing with the powers and the limits of government are vague and must in practice be interpreted by human beings, it follows that the Constitution as practice is a living thing."[89]

These opposing viewpoints were summarized by one symposium participant, Johns Hopkins political science professor James Hart, as follows:

> Whoever would be consistent in his thinking about the Constitution must choose between two fundamentally different philosophies . . . . The one assumes a dynamic universe in which new factors and hence new problems emerge. The other postulates a universe whose very changes take place in accordance with a few unchanging principles. The first recognizes the necessity of choice in the application to new situations of the lessons of the past, and hence regards principles as "methods by which the net value of past experience is rendered available for present scrutiny of new perplexities." The second treats principles as the unambi-

85. *E.g.*, Henry Hazlitt, *Our Obsolete Constitution*, THE NATION, 124, 124-25 (1931).

86. *Urges Abolishing of the Constitution*, N.Y. TIMES, Dec. 28, 1931, at 12 (reporting on a speech given by Dr. Jesse Holmes in Philadelphia).

87. *See* KAMMEN, *supra* note 15 (ascribing these views to Charles Beard, Vernon Parrington, Carl Becker, and J. Allen Smith).

88. *See, e.g.* David Prescott Barrows, *The Constitution as an Element of Stability in American Life*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (May 1936); Walter F. Dodd, *The Powers of the National Government*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 65 (May 1936).

89. Charles Beard, *The Living Constitution*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 29, 31 (May 1936).

> guous axioms from which the answer to every problem may be automatically deduced.
>
> From these two philosophies may be derived two sharply conflicting conceptions of the Constitution. In the one view it is a charter meant to endure for ages to come, and hence to be adapted to the circumstances and the dominant purposes of each succeeding generation. In the other view it is the enactment for all time of principles of fixed meaning and universal validity.[90]

Hart's characterizations of the "fundamentally different philosophies" of constitutional interpretation were doubtless influenced by his commitment to the "living Constitution" philosophy. But his characterizations of the contrasting epistemological perspectives that informed each of the philosophies were accurate. The traditionalist interpretive perspective on the Constitution was predicated on a view of the universe in which humans could do little to alter the inevitable path of external forces. From the universality of those forces, fixed principles of law and government were deduced. Those principles were embodied in the Constitution. The alternative "living Constitution" perspective emphasized human choice as the dominant principle of causation in a "dynamic universe." If humans could choose the world in which they lived, they could choose the constitutional principles by which they wanted to be governed.

(2) The Demise of the Traditional Meaning of Adaptability on the Court: Police Power Cases

The 1936 American Academy of Political and Social Science symposium revealed that contemporaries of the *Blaisdell* decision had seen it for the fundamental interpretive conflict that it was.[91] But similar interpretive conflicts were going on in other cases involving regulation of the economy in the 1930s. One example was the line of cases testing the appropriate reach of the police power against due process challenges, cases that later came to be called "substantive due process" cases.[92]

90. James Hart, *A Unified Economy and States' Rights*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 102, 102 (May 1936).

91. *See supra* notes 88-90.

92. This line of cases is a centerpiece of Barry Cushman's analysis in STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, manuscript at 107-38. Although my analysis emphasizes different dimensions of the Court's police power/due process decisions in the 1920s and 1930s, it builds upon Cushman's work. On the "discovery" of early twentieth century police power cases as "substantive due process" cases, see White, *Revisiting Substantive Due Process, supra* note 67, which notes that the term "substantive due process" did not appear in any federal case until 1942, and that commentators were still using the term "police power" for *Adkins*-type cases in the early 1940s.

Adkins v. Children's Hospital,[93] decided in 1923, provides an opportunity to view the established discourse of late nineteenth century police powers jurisprudence still in place. Within these established categories, the *Adkins* case was familiar.[94] Congress had created a minimum wage board for the District of Columbia and delegated it power to establish minimum wages for women and minors employed within the District.[95] The constitutional challenge to the statute employed a series of arguments characteristic of police powers due process cases: the statute was said to have interfered with the "liberty" of employers and employees within the District to fix the terms of their employment contracts.[96] Unlike a legitimate legislative use of police power, the law was not limited to businesses "affected with a public interest."[97] It was not designed to protect persons engaged in a particularly hazardous occupation.[98] It was not an effort to prevent fraud in the payment of wages.[99] In short, opponents argued that it did not come within the set of "exceptional circumstances"[100] in which the legislature could exercise its police power to restrain freedom of contract.

In embracing those arguments, Sutherland's majority opinion placed the statute under review in *Adkins* in one category rather than another. Being an interference with "liberty of contract," and not having as its rationale one of the legitimate bases for exercise of the police powers, it was thus "arbitrary" rather than "reasonable."[101] In the opinion, Sutherland took pains to emphasize that in reading the Due Process Clauses to preclude broadly based minimum wage legislation the Court was not "exercis[ing] . . . a substantive power to review and nullify acts of Con-

93. 261 U.S. 525 (1923).

94. For an analysis of *Adkins* which appreciates it on its own terms, as a case testing the categories of orthodox police powers jurisprudence, rather than as an anachronistically conceived "substantive due process" case, see GILLMAN, THE CONSTITUTION BESIEGED, *supra* note 67, at 167-74.

95. *Adkins*, 261 U.S. at 539-42.

96. *Id.* at 535.

97. *Id.* at 536.

98. *Id.*

99. *Id.* In McLean v. Arkansas, 211 U.S. 539, 543, 552 (1909), the Court upheld a statute requiring coal operators to pay their employees based on the amount of "prescreened" coal they had mined, rather than on the amount after it had been screened. An industrial commission created by Congress in 1898 to investigate working conditions in the coal mining industry had identified the practice of employers of screening mined coal and basing wages on screened amounts, noting that this had resulted in controversy between operators and miners. *Id.* at 549-50. The Court in *McLean* concluded that the statute was analogous to those designed to prevent fraud in business transactions and therefore was a legitimate exercise of the police power. *Id.* at 550.

100. *Id.* at 546, 554.

101. *Id.* at 556-59.

gress."[102] No such substantive power existed, Sutherland maintained.[103] In reviewing the constitutionality of legislation, all judges were doing was exercising the "power vested in courts to enable them to administer justice according to law."[104] Judges had the authority "to ascertain and determine the law in a given case."[105] It followed from that authority that if "by clear and indubitable demonstration a statute be opposed to the Constitution, we have no choice but to say so."[106] The judicial "duty" in constitutional cases "to declare and enforce the rule of the supreme law and reject that of an inferior act of legislation" was not a "substantive" exercise.[107] It was "simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the court, to the determination of which must be brought the test and measure of the law."[108]

Sutherland's conception of the role of judges in constitutional adjudication was thus premised on two assumptions: that the "meaning" of the Constitution was sufficiently finite and fixed and its principles were easily ascertainable, and that judges "interpreting" the Constitution simply declared and enforced preexisting legal rules. Established police powers jurisprudence was consistent with those assumptions. When a statute infringed on entrenched "liberties," it only passed constitutional muster if it was a reasonable exercise of the police power, and judges had familiar guidelines to determine its constitutionality. The exercise was sufficiently mechanical and the rules sufficiently clear to strip it of any substantive dimensions.

Ignored in Sutherland's formulation, of course, was any sense that the categories of police powers jurisprudence had themselves been created by judges. The concepts of property "affected with a public interest," and "liberty of contract" were not mentioned in the text of the Constitution. They were devices to bridge the gap between open-ended textual provisions such as "liberty" in the Due Process Clauses, loosely defined legislative powers such as the police powers of the states, and concrete legal controversies. However, they were not openly treated as such in Sutherland's opinion in *Adkins*; they were treated as nearly the equivalent of independent legal entities that a judge "declare[d]."[109]

102. *Id.* at 554.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* The words "openly" and "nearly" in this sentence are used advisedly. The interpretive approach reflected in Sutherland's *Adkins* opinion should neither be confused with textual "originalism" nor with a view that judicial interpretation was a process wholly lacking in

For advocates of the "living Constitution" perspective, the categories of police powers jurisprudence appeared to be performing a function quite different from that implicitly ascribed to them by Sutherland's *Adkins* opinion. Sutherland's opinion had treated police power categories as if they were finite legal rules to which a judge appealed in police power cases. Interpretive critics of the opinion saw them as vessels into which ideological content could be poured. In their view, police power doctrinal buzzwords—such as whether a business was "affected with a public interest," or whether a statute allegedly infringing on some "liberty" had a "public purpose"—could be seen as formulas through which groups of judges expressed their conviction that it was either a good or a bad thing for a particular business in question to be subject to hours or wages regulation.

A comparison of Holmes's dissent[110] with Sutherland's opinion in *Adkins* reveals that Holmes was not merely abandoning the established categories of police powers jurisprudence, he was abandoning the interpretive role of the judge in political economy cases that accompanied them. As noted, that role was predicated on the existence of a timeless body of constitutional principles that restrained legislative activity. The principles themselves were the product of assumptions about the structure of republican government and the inevitability of certain external "laws" in the universe, such as Sutherland's "law" that the forces of supply and demand set wage levels and thus any governmental alteration of those

creativity. "Liberty of contract" was not a concept extracted from a literalist or originalist reading of the constitutional text, but from what might be termed an originalist reading of the Constitution's metaprinciples, including metaprinciples of political economy. Sutherland's approach presupposed that "liberty" in the Fifth or Fourteenth Amendments *must necessarily* mean "liberty of contract" because of fundamental assumptions about private rights and governmental obligations in the realm of political economy which he took to be assumptions embodied in the Constitution. This approach also assumed that Supreme Court justices had a certain freedom (the flip side of their duty as interpreters in a constitutional republic) to decide when "liberty of contract" trumped the police power and when it did not.

110. *Id.* at 567-71 (Holmes, J., dissenting). There was another dissent in *Adkins*, by Chief Justice Taft, an opinion that Cushman rightfully identifies as an important landmark in the transition between the way a majority of the Court was conceptualizing police power cases in the 1920s and the way a different majority was conceptualizing those cases after 1937. *See* CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, manuscript at 195-96. Taft's opinion worked within the established doctrinal categories of police powers jurisprudence, and accepted the established role of judges as "pricking out" the "boundary" between private rights and the sphere of public governance in the realm of political economy. *Adkins*, 261 U.S. at 562 (Taft, C.J., dissenting). However, Taft conceded that distinctions in minimum wage/due process/police power cases derived more from the common sense of political economy than from constitutional imperatives. *Id.* at 565 (Taft, C.J., dissenting). I have omitted an extended treatment of Taft's dissent because the contrast between Sutherland's and Holmes's interpretive postures is far more stark.

levels worked an injustice to one of the parties in an employment contract.[111]

Judges discerned and enforced this body of constitutional and meta-constitutional principles.[112] It was their job to ensure that the sovereign power of legislatures yielded to the transcendent sovereign power of the Constitution where conflicts existed. Thus, in interpreting the term "liberty" to include "liberty of contract," judges were simply declaring the incontrovertible proposition that in a republican polity the private, consensual arrangements of individuals were shielded from arbitrary legislative interference. The fact that the legislature represented "the people" did not give it *carte blanche* to interfere with individual liberties because the Constitution represented the people as well.

The approach Holmes took toward judicial review of legislation in *Adkins* was premised on a radically different view of the roles of the legislature and the judiciary in the American constitutional system. Nowhere in Holmes's dissent was there a suggestion that "liberty of contract" was a timeless principle of republican government. Instead, it was a creation of judges — a "dogma" — the result of the Due Process Clauses having "vague contours" that tempted judges to equate their own ideological predilections with constitutional principles.[113] That was inappropriate because legislators, not judges, were charged with the responsibility of determining what was best for the public under the American system of government. If legislatures decided that minimum wage levels for women and children helped "remove conditions leading to ill health, immorality and the deterioration of the race," it was not for judges to second-guess them.[114]

Because Holmes's dissent subsequently came to be seen as enlightened wisdom by commentators,[115] there has been a tendency to charac-

111. *See Adkins*, 261 U.S. at 554.

112. At times, adherents of established police powers jurisprudence acted as if the principles were encompassed in textual provisions of the Constitution, such as "liberty" in the Due Process Clauses, but at other times they treated the principles as endemic to the nature of republican government. The principle that a legislature could not take property from A and give it to B, for example, could be seen either as embodied in the Due Process Clauses or simply as foundational to a republican state and thus necessarily part of the structure of the Constitution.

113. *Id.* at 568 (Holmes, J., dissenting).

114. *Id.* at 567 (Holmes, J., dissenting).

115. Holmes's most vocal and arguably influential acolyte in the late 1920s and 1930s was Felix Frankfurter, but there were others. *See* Felix Frankfurter, *Mr. Justice Holmes and the Constitution: A Review of his Twenty-Five Years on the Supreme Court*, 41 HARV. L. REV. 121 (1927); FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT (1938). For an effort to associate Holmes's interpretive posture in cases such as *Adkins* with the Realist movement of the 1930s, see Karl N. Llewellyn, *Holmes*, 35 COLUM. L. REV. 485 (1935). Llewellyn's orientation in that essay was more toward general jurisprudence rather than constitutional interpretation, but it was entirely consistent with the "living Constitution" rubric. *See*

terize decisions such as *Adkins* as otherworldly efforts by an isolated, reactionary Court. But orthodox police powers jurisprudence persisted well beyond *Adkins*; it was the analytical mode employed by the decision that overruled *Adkins* fourteen years later, *West Coast Hotel v. Parrish*.[116] The *Parrish* case has conventionally been identified as the case that ushered in the "constitutional revolution," demonstrating either the Court's embarrassing capitulation to political pressures or its sensible accommodation to the modern world, depending on the commentator's point of view.[117] However, a glance at the opinions in the case reveals the categories of orthodox police powers jurisprudence still intact.

Parrish tested the constitutionality of a Washington statute prescribing minimum wage levels for women and minors working in industries or occupations within the state.[118] A custodian, Elsie Parrish, brought suit against her employer, a hotel, to recover the difference between her actual wages and the minimum fixed by the state that she should have received.[119] She was awarded the amount of her claim and the hotel appealed, citing *Adkins* and invoking the Fourteenth Amendment's Due Process Clause.[120]

Chief Justice Charles Evans Hughes began his opinion for the Court by noting that *Parrish* was a typical police power due process case, pit-

id. at 487-88.

116. 300 U.S. 379 (1937). *See* CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, manuscript at 225-38. Cushman argues that a police power/due process case the Court decided between *Adkins* and *Parrish*, Nebbia v. New York, 291 U.S. 502 (1934), provides a hitherto underemphasized key to the "constitutional revolution" itself. I agree with Cushman that the *Nebbia* decision's blurring of the "public/private" distinction on which traditional police powers jurisprudence was founded, reflected in the buzzwords "affected with a public interest," was a crucial factor in delegitimating the entire structure of doctrinal categories on which that traditional jurisprudence rested. However, no opinion in *Nebbia* matches those in either *Adkins* or *Parrish* in advancing fully developed statements of the contrasting interpretive positions I am analyzing in this Article.

117. *West Coast Hotel v. Parrish* is characterized by William Leuchtenburg as "triggering a constitutional revolution." LEUCHTENBURG, *supra* note 4, at 163. Leuchtenburg seems unable to restrain his enthusiasm for Elsie Parrish, the "chambermaid" petitioner in *Parrish*, saying that she had "accomplished something of historic significance . . . for the thousands of women scrubbing floors in hotels . . . who needed to know . . . that they could summon the law to their side," but is far less enthusiastic about the Court that supposedly "switched" its constitutional jurisprudence in 1937, suggesting at one point that the Court's "performance . . . proved especially embarrassing" to its own Chief Justice, Charles Evans Hughes. *Id.* at 177, 179.

For a recognition of the survival of orthodox police powers jurisprudence in Sutherland's opinion in *Parrish*, see GILLMAN, THE CONSTITUTION BESIEGED, *supra* note 67, at 192-93. I disagree with Gillman's claim that with the *Parrish* decision "[n]ew social facts had finally brought down a century-old police powers jurisprudence," *id.* at 193, unless by "new social facts" Gillman is willing to include new epistemological attitudes, which would seem to strain the ordinary meaning of "facts."

118. 300 U.S. at 386-87.

119. *Id.* at 388.

120. *Id.*

ting liberty against the "power . . . to restrict freedom of contract . . . in the public interest."[121] He then traced a variety of cases in which statutes had restricted liberty because the business in question was "affected with a public interest" or because "health and safety, . . . peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression."[122] By the last phrase Hughes meant regulations striking at unequal bargaining power, in contexts where "proprietors lay down the rules and the laborers are practically constrained to obey them."[123] In such circumstances, Hughes maintained, "self-interest is often an unsafe guide, and the legislature may properly interpose its authority."[124]

Hughes argued that legislative intervention was particularly applicable to the employment of women in order to correct inequalities in wages brought about by inequalities in bargaining power.[125] Citing *Muller v. Oregon*[126] and other cases where the Court had permitted states to give special protection to female workers, Hughes noted that those cases "emphasized the need of protecting women against oppression despite her possession of contractual rights."[127] He quoted *Muller* to the effect that "there is that in [a woman's] disposition and habits of life which will operate against a full assertion of those rights," and concluded that "some legislation to protect her seems necessary to secure a real equality of right."[128]

Moreover, according to Hughes, there were other public benefits in legislation placing women in an advantaged position. Because of "the performance of maternal functions," the physical well-being of women was "an object of public interest and care in order to preserve the strength and vigor of the race."[129] Thus, minimum wage legislation, which was designed in part to prevent women from having to work long hours to earn a sufficient wage, was "not imposed solely for her benefit, but also largely for the benefit of all."[130]

This "array of precedents and the principles they applied" was thought by Hughes to be sufficient to sustain the Washington statute despite *Adkins*.[131] However, he was prepared to go further and overrule

121. *Id.* at 392.
122. *Id.* at 393.
123. *Id.* at 394.
124. *Id.* at 394.
125. *Id.*
126. 208 U.S. 412 (1908).
127. *Parrish*, 300 U.S. at 394.
128. *Id.* at 394-95 (citations omitted).
129. *Id.* at 394 (citations omitted).
130. *Id.* at 395 (citations omitted).
131. *Id.*

Adkins altogether. He argued that the distinction fashioned by Sutherland in *Adkins* between maximum hours legislation and minimum wage legislation could not stand.[132] Limitations on either hours or wages affected freedom of contract in its absolute sense, as Taft had pointed out in *Adkins*.[133] In neither instance was the state compelling an employer to meet the terms of the legislation; if the employer's business could not meet the burden, it would employ fewer workers.[134] Both situations would simply result in fewer profits "wrung from the necessities of . . . . employees," which would benefit the community at large.[135]

Hughes's analysis was primarily conducted within the conventional terms of police powers jurisprudence. However, there were two signals in *Parrish* that a majority of the Court was in the process of recasting the methodology of constitutional interpretation in such cases. Both signals were noted by Sutherland, writing for the four dissenters in *Parrish*, and Sutherland took the signals to be ominous developments.[136]

The first signal was Hughes's articulation of the standard of review in Due Process Clause cases. Rather than speaking of "liberty of contract" in such cases as being "absolute and uncontrollable," Hughes defined it as "liberty in a social organization," having "its history and connotation," and being "necessarily subject to the restraints of due process."[137] He then defined regulation that would conform to constitutional Due Process standards as "regulation which is reasonable in relation to its subject and is adopted in the interests of the community."[138]

This standard of review meant, of course, that "liberty of contract" had ceased to be a fixed principle of republican government and become a phrase with "its [own] history and connotation," subject to the exigencies of changing political and economic conditions. This new contextual definition of "liberties" in Due Process Clause cases suggested that the judiciary was prepared to become a more passive actor in such cases. Abandoning fixed principles of constitutional analysis in police powers jurisprudence meant that police powers cases would henceforth have no bright line categories such as "affected with a public interest." In such an analytical realm it was unlikely that many legislative judgments about the appropriate scope of regulatory legislation would be second-guessed.

Although this signal surely spelled the end of *Adkins*, it was probably less provocative to Sutherland and the other dissenters in *Parrish* than the second of Hughes's signals in *Parrish,* which was directed at the ex-

132. *Id.*
133. *Id.* at 395-96.
134. *Id.* at 396-97.
135. *Id.* at 397 (citations omitted).
136. *See id.* at 400-14 (Sutherland, J., dissenting).
137. *Id.* at 391.
138. *Id.*

ternal context of constitutional interpretation. In suggesting that *Adkins* did not definitively resolve the question in *Parrish,* Hughes pointed out some factors that "demand[ ] on our part a reexamination of the *Adkins* case."[139] He included among those factors "the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, [which] make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration."[140] Later in his opinion, Hughes referred to "the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent."[141] Depressed economic conditions had accentuated the plight of "a class of workers who are in an unequal position with respect to bargaining power."[142] Their vulnerability was "not only detrimental to their health and well being but cast[ ] a direct burden for their support upon the community."[143]

The clear import of these comments was that the meaning of constitutional principles was affected by the current social context. The principle of protection for "liberty of contract" presupposed that bargaining power was simply a function of the marketplace, so that "inequalities" were endemic and could not be redressed by legislative intervention. Hughes was suggesting that when inequalities in bargaining power were accentuated by an already depressed economy, the liberty of contract principle should not stand in the way of legislative relief. His analysis also assumed that the burdens imposed on workers by their lack of bargaining power were burdens that the rest of society would eventually assume: "What these workers lose in wages the taxpayers are called upon to pay."[144] Thus, the invocation of the liberty of contract principle under such conditions was inefficacious. According to Hughes, the problem with the prevailing "connotation" of liberty of contract was that it stood in the way of some necessary paternalistic legislation.

It is not clear whether Hughes, in referring to "fresh consideration" of a portion of the constitutional text in light of "economic conditions which have supervened" since its framing,[145] was asserting the Marshallian version of adaptivity or its modern counterpart. Sutherland, however, thought he understood which of those versions Hughes was advancing:

139. *Id.* at 390.
140. *Id.*
141. *Id.* at 399.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 390.

> It is urged that the question involved should now receive fresh consideration, among other reasons, because of "the economic conditions which have supervened"; but the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise.[146]

It may be difficult for contemporary readers to grasp the distinction Sutherland sought to draw. That distinction was between fixed principles as "intelligently and reasonably construed" by judges,[147] and the application of those principles to changing conditions. When novel features in American civilization precipitated the creation of new legal issues, judges were to resolve those issues by the application of principles that were already in existence. As Sutherland put it, "[w]hat a court is to do . . . is *to declare the law as written*, leaving it to the people themselves to make such changes as new circumstances may require. According to this viewpoint, the meaning of the constitution is fixed when it is adopted and it is not different at any subsequent time."[148] Sutherland had stated the traditional meaning of adaptivity in constitutional interpretation.

Traditional police powers analysis furnished an opportunity to put Sutherland's theory of constitutional interpretation into practice. That analysis pitted legislation justified under traditional police powers against constitutional challenges based on "liberty of contract." The police power of the federal government and the states was not explicitly mentioned in the Constitution, except perhaps obliquely in the General Welfare Clause,[149] but "everyone" knew that the power to promote the health, safety and morals of the people was fundamental to republican government. Similarly, "liberty" was mentioned in both the Fifth and Fourteenth Amendments, and "everyone" knew, at least after the 1880s, that "liberty" included the freedom to enter into contracts and to set the terms of those contracts. So the "meaning" of the Constitution was fixed, both with respect to the sanctity of liberty in the Due Process Clauses and with respect to the legitimacy of the police power. The meaning of the Constitution did not change in its applications; the process

146. *Id.* at 402-03 (Sutherland, J., dissenting).
147. *Id.* at 404 (Sutherland, J., dissenting).
148. *Id.* (Sutherland, J., dissenting) (citations omitted).
149. U.S. CONST. art. I, § 8.

only confirmed that "the Constitution is made up of living words that apply to every new condition which they include."[150]

Thus the minimum wage cases could be seen as pitting two irreconcilable conceptions of constitutional interpretation against one another. Under Sutherland's conception, the fixed meaning of the Constitution was that minimum wage legislation violated the first principles of republican government by taking property from A and giving it to B. It also violated the "liberty" of all citizens to set the terms of their own employment without interference from the state. Although the state could sometimes interfere with contractual relations, those instances were limited to cases in which all members of the citizenry were implicated in the health, safety, or welfare features of a contract. Contracts involving women laborers were not examples of such cases, simply by virtue of the sex of those laborers. Thus, the Court had a "duty" to invalidate minimum wage legislation. As Sutherland put it:

> The suggestion that the only check upon the exercise of the judicial power . . . is the judge's own faculty of self-restraint, is both ill considered and mischievous. Self-restraint belongs in the domain of will and not of judgment. The check upon the judge is that imposed by . . . the Constitution[;] he has the duty to make up his own mind and adjudge accordingly.[151]

Under the conception of constitutional interpretation employed by Hughes in *Parrish,* the meaning of "liberty" in the Due Process Clauses and the scope of the police power in minimum wage cases was a function of circumstance. If a depression in the wages for female workers in hotels meant that they were in danger of failing to earn a living wage and of becoming candidates for poverty relief, the state could step in to guarantee them a living wage and keep them from becoming burdens on the rest of the citizenry. There was, then, no fixed principle that the state could not interfere with "liberty of contract"; whether or not the state could interfere depended on the consequences of its noninterference. The meaning of the Constitution could not be divorced from the context in which its provisions were interpreted. Constitutional adaptivity had itself taken on a new meaning.[152]

150. *Id.* at 402-03 (Sutherland, J., dissenting).

151. *Id.* at 402 (Sutherland, J., dissenting).

152. One could argue, as Cushman has, that the new meaning of adaptivity had its first important statement in *Nebbia v. New York,* 291 U.S. 502 (1934), handed down three years before *Parrish. See* CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, manuscript at 252-62. The date of *Nebbia* is important for Cushman because it is part of his argument that the jurisprudence of the "constitutional revolution" in political economy cases was established well before the 1936 election and the early 1937 introduction of the Court-packing plan. As noted, I do not find *Nebbia* to be as significant an interpretive exemplar as *Parrish. See supra* note 116. Perhaps that can be explained simply by the comparative rhetorical skills of Hughes and Roberts. For further development of this point, see WHITE,

II. The Triumph of the New Meaning of Adaptivity: *Wickard v. Filburn*[153]

As of this writing, *Parrish* marked the last time in the twentieth century when the Court has employed the traditional nineteenth century categories of police power jurisprudence in a due process challenge to paternalistic state legislation in the realm of political economy. As an interpretive milestone, I have suggested that its message was ambiguous. However, there was a case in the period conventionally described as encompassing the "constitutional revolution"—the period from 1937 to the end of the Second World War—which clearly signified that an interpretive revolution was established in the realm of political economy. The case was not a due process case but a Commerce Clause case, *Wickard v. Filburn.*

Another contribution of revisionist constitutional history since the 1970s has been the demonstration of an innate complexity in the methodology of late nineteenth and early twentieth century constitutional jurisprudence. That complexity may be stated as follows: Late nineteenth and early twentieth century judges and jurists thought in categorical terms about constitutional issues. Their categories were not only composed of different areas of constitutional law (Contracts Clause issues versus Takings Clause issues versus Due Process Clauses issues), but of different spheres of the realm of political economy ("public" versus "private"). Notwithstanding this "categorical" mindset, late nineteenth and early twentieth century judges and jurists were prone to what might be called "doctrinal radiation," a process by which an interpretive approach to one area of constitutional law (e.g., the Due Process Clauses) radiated into another (e.g., the Contracts Clause).[154]

It would be too much to call this complexity a paradox, because the doctrinal radiations that flowed from one area of the constitutional law of political economy between the 1870s and 1930s did not overwhelm juristic categorization. However, they can be said to have had an important intuitive effect. As some members of the Court began to rethink their approach to police power/due process issues in the 1920s and 1930s, that intellectual process can be shown to have had an impact on their approach

AMERICAN JUDICIAL TRADITION, *supra* note 22, at 211.

153. 317 U.S. 111 (1942).

154. *Compare* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 16-19 (1992) *with* Charles McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Paramerters of Laissez-Faire Constitutionalism, 1863-1897,* 61 J. AM. HIST. 970 (1975) *and* CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, manuscript at 131-34.

to other issues in the realm of political economy, such as Commerce Clause issues.[155]

In the period between the 1920s and the early 1940s, Commerce Clause jurisprudence underwent a transformation roughly parallel to that of police powers jurisprudence, with doctrinal concepts such as the "current" or "stream" of commerce and doctrinal formulas such as the distinction between the "direct" and "indirect" effects of an activity on interstate commerce becoming increasingly more pliable and less easy to maintain. Finally, in the 1941 case of *United States v. Darby Lumber Co.*,[156] the "stream of commerce" doctrine was overwhelmed by a raging river: the sphere of federal regulation in the realm of political economy became much more intrusive.[157] And a year after *Darby* the Court went even further, implicitly abandoning the "direct"/"indirect" distinction and all other legal distinctions in Commerce Clause jurisprudence and concluding that Congress could regulate whenever it had a plausible *economic* reason for thinking that regulation of a particular industry had some substantial positive effects on interstate commerce.[158] The remarkable feature of that case, *Wickard v. Filburn,* was that the Court virtually admitted that in the future, Commerce Clause questions were to be seen essentially as "living Constitution" questions: questions that asked to what extent the meaning of the Constitution could be altered by judges to make it responsive to the exigencies of a modern economy.

Wickard v. Filburn was initially a troublesome case for the justices because they could not see any connection between the activities of Roscoe Filburn and interstate commerce. Filburn was an Ohio farmer

155. Tracing doctrinal radiations is an important goal of Cushman's project. *See, e.g.*, Cushman, *Stream of Legal Consciousness*, *supra* note 12, at 108; Cushman, *Doctrinal Synergies and Liberal Dilemmas*, *supra* note 12, at 238.

156. 312 U.S. 100 (1941). In *Darby*, a unanimous court treated the wages of workers in a lumber yard in Georgia as coming within the Fair Labor Standards Act of 1938's prohibition against wages below a certain amount for industries engaged in "production for interstate commerce." Hitherto, wages in industries engaged in "manufacturing," as distinguished from "commerce," had been exempt from federal requirements.

157. This reading of the case is strengthened by the fact that Hughes, whose opinion in the earlier case of NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), had retained the traditional distinctions of Commerce Clause jurisprudence, only grudgingly joined Stone's *Darby* opinion. He first declined to vote to sustain the Fair Labor Standards Act, eventually only "going along" with Stone's opinion when it became clear that there would be no dissenters. *See* Conference Notes, William O. Douglas Papers, Library of Congress; Conference Notes, Frank Murphy Papers, University of Michigan Library, *quoted in* CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, manuscript at 580-81. In the justices' conference on *Darby*, Hughes said that Fair Labor Standards Act "reaches into the field of production" and as such threatens to put "our dual system of government . . . at an end." *Id.* He remained skeptical as to whether Congressional regulation of the hours and wages of workers in a local lumberyard was justified by the commerce power. *See id.*

158. *See* Wickard v. Filburn, 317 U.S. 111 (1942).

who was required by the Agricultural Adjustment Act of 1938 to plant only a limited allotment of wheat.[159] He planted twice as much as that allotment, however, and having shipped his allotted wheat to market, retained the rest for use and consumption on his farm.[160] He was assessed a penalty by Ohio county and state Conservation Committees that had been established by the Act, and he sued to enjoin enforcement of that penalty.[161] In the process, he challenged the wheat marketing provisions of the Act as unconstitutional.[162]

As noted, *Wickard v. Filburn* came at a time when the Court's Commerce Clause jurisprudence appeared to be poised to abandon the categorical formulas of the early twentieth century. However, it was not clear what the Court was prepared to put in their place. Because the wheat for which Filburn was penalized had neither been produced for nor shipped in interstate commerce, and yet Congress had sought to regulate its use in the Agricultural Adjustment Act of 1938, the case appeared to pose three options for the Justices. One was to employ traditional formulas and declare the Act unconstitutional as applied to the private consumption of wheat. Under this reasoning, wheat produced for private consumption was not "in commerce," or in "interstate commerce," and its effect on interstate commerce was not "direct." After *Darby* it was patently clear that the Court would not exercise that option.[163]

The second possibility was to declare that the production of wheat for home use had a "substantial effect" on interstate commerce, following language employed by Stone in *Darby*.[164] This option would have preserved some (although not much) continuity with prior Court cases, and would have retained some judicial power to make independent determinations of the connection between Congressional regulation of a particular economic activity and interstate commerce. Despite the advantages of that option, it posed one major difficulty for the Court: it was hard to see how one farmer's decision to produce more wheat for his own consumption had *any* effect on interstate commerce, let alone a substantial one. If all farmers acted as Filburn had, then the farming community would cease to become prospective buyers of each other's wheat, but there was no evidence that other farmers were inclined to follow Filburn's example.

The third option was for the Court to treat Congress's decision to establish marketing quotas in the Agricultural Adjustment Act as evidence that *Congress* believed that the production of wheat for home use would

159. *Id.* at 113-16.
160. *Id.* at 114.
161. *Id.*
162. *Id.*
163. *See supra* note 156.
164. *Darby*, 312 U.S. at 119.

have a substantial effect on interstate commerce. According to this line of reasoning, in establishing the quotas Congress apparently believed that if enough farmers produced wheat for their own consumption the demand for wheat in interstate commerce would be reduced, and this would have a negative effect on the price of interstate wheat. A principal purpose of the Agricultural Adjustment Act had been to help depressed industries, such as the wheat industry, by supporting the prices of goods from those industries. Thus, one could conclude that Congress believed there was a substantial connection between supporting the price structure of the wheat industry and establishing federal marketing quotas for the production of wheat for home consumption. If the Court found that belief reasonable, it could sustain the legislation as an appropriate exercise of the commerce power.

Wickard v. Filburn was first argued before the Court in May, 1942.[165] After that argument, it was clear that though the justices believed that the marketing quotas amounted to a "regulation of commerce," they were hard-pressed to find that the application of the quotas to Filburn amounted to an actual regulation of interstate commerce or a regulation of an activity that had a substantial effect on interstate commerce. Thus, penalizing Filburn for growing wheat for his own consumption seemed unconstitutional under any formula currently in use in Commerce Clause jurisprudence, including that adopted by the Court in *Darby*.

However, the Court did not generate an opinion with that conclusion. Instead, it discussed how more facts might be obtained to buttress a finding that the regulation of wheat for home consumption had a substantial effect on interstate commerce. An early draft of an opinion by Justice Robert Jackson favored remanding the case to a lower court to determine whether that substantial effect existed.[166] As Jackson stated in that draft, "Congress may not act by its will alone, for it was not given to one of the parties to the federal compact to expand its own functions at will . . . . [I]t is the function of the courts to determine whether the particular activity regulated or prohibited is within the reach of federal power."[167] That passage presupposed the traditional role for the Court of policing the boundaries of governmental power and private authority, whether in connection with the Commerce Clause or the Due Process Clauses.

165. *Wickard*, 317 U.S. at 111.

166. Jackson's draft opinion is discussed in CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, manuscript at 590-91.

167. Opinion draft, *Wickard v. Filburn*, May 22, 1942, at 10, 12, *in* ROBERT JACKSON PAPERS (available in the Library of Congress), *quoted in* CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, manuscript at 590-91.

But it became apparent that some justices on the Court were less interested in the details of the relationship between the production of wheat for home consumption and interstate commerce than they were in the question whether the Court should continue its traditional role in Commerce Clause cases. An analogy to the Court's Due Process Clause jurisprudence seemed to have surfaced. As the Due Process Clause cases moved into the 1930s, the twin pillars of categorist methodology—that there were bright lines between the public and private spheres of the realm of political economy and that judges fashioned and policed those lines—began to crumble. Eventually the public/private distinction became obliterated, and *Parrish* replaced judicial policing with judicial deference to the minimal rationality of legislatures. In *Wickard v. Filburn,* the justices appeared to be groping toward similar postures.

After Jackson's original opinion in *Wickard v. Filburn* was withdrawn, and a majority of the Court voted to have the case reargued the next term, Jackson exchanged letters with some other justices and his law clerk.[168] In those letters he articulated his growing conviction that drawing lines in Commerce Clause cases was no easier than in Due Process Clause cases. Just as there was no easily cabinable category of business affected with a public interest,[169] there was no easily cabinable definition of activities that were "intrastate" in character, bearing no relationship to interstate commerce. Thus, the questions in Commerce Clause cases were not legalistic ones, but economic ones. "In such a state of affairs," Jackson wrote to his law clerk in July 1942, "the determination of the limit of [Congress's power under the Commerce Clause] is not a matter of legal principle, but of personal opinion; not one of constitutional law, but one of economic policy."[170]

In memoranda on *Wickard v. Filburn* in the summer of 1942, little by little, Jackson worked himself around to the position that "that is within the commerce power which Congress desires to regulate."[171] The facts of *Wickard v. Filburn* made it clear that if the Court sustained the Agricultural Adjustment Act of 1938 as applied to Filburn, "I don't see how we can ever sustain states' rights again as against a Congressional

168. These have also been preserved in the Robert Jackson Papers. *See* CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, manuscript at 592-616.

169. A majority of the Court had committed itself to that proposition in *Nebbia,* but as late as the early 1940s it was still not clear whether the implications of that commitment had fully been grasped.

170. Robert Jackson, Memorandum for Mr. Costelloe, Re: *Wickard* Case (July 10, 1942), at 15, *in* ROBERT JACKSON PAPERS, (available in the Library of Congress) [hereinafter July 10 Memorandum], *quoted in* CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, manuscript at 603.

171. July 10 Memorandum, *supra* note 170, at 16, *quoted in* CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, manuscript at 604.

exercise of the commerce power."[172] Instead of using this conclusion as a basis for resurrecting the categories of Commerce Clause jurisprudence and invalidating the Act, Jackson began to think of using it as a basis for "introduc[ing] . . . economic determinism into the constitutional law of interstate commerce" and initiating "the end of judicial control of the scope of federal activity."[173] He was moving toward "[a] frank holding that the interstate commerce power has no limits except those which Congress sees fit to observe."[174]

In July 1942, Jackson outlined to his law clerk the basis of an opinion sustaining the application of the Act to Filburn. He wrote:

> Congress has seen fit to regulate small and casual wheat growers in the interest of large and specialized ones . . . . Whether this is necessary, whether it is just, whether it is wise, is not for us to say . . . . [W]e have no legal standards by which to set our judgment against the policy judgment of Congress . . . . [The regulation of wheat grown for home consumption] is within the federal power to regulate interstate commerce, if for no better reason than the commerce clause is what the Congress says it is.[175]

The law clerk, stunned by the implications of Jackson's position, asked:

> [Are] *all* the old formulae and tests junked . . . . Is the Court never to seek to preserve our 'dual system of government' by denying that the Commerce Power can reach to 'effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government?'[176]

Jackson's response was that "in order to be unconstitutional . . . the relation between interstate commerce and the regulated activity would have to be so absurd that it would be laughed out of Congress."[177]

In October 1942, the *Wickard* case was reargued, and in November of that year the Court handed down a unanimous opinion, authored by Jackson.[178] In sustaining the Agricultural Adjustment Act penalty against

172. Robert Jackson, Memorandum for Mr. Costelloe, Re: *Wickard* case (June 19, 1942), at 5, in ROBERT JACKSON PAPERS, (available in Library of Congress) [hereinafter June 19 Memorandum], *quoted in* CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, manuscript at 604.

173. June 19 Memorandum, *supra* note 172, at 6, *quoted in* CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, manuscript at 604-05.

174. *Id.*

175. July 10 Memorandum, *supra* note 170, at 22, *quoted in* CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, manuscript at 606-07.

176. Robert Jackson, Memorandum AAA, at 1, *in* JACKSON PAPERS, (available in Library of Congress), *quoted in* CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, manuscript at 607.

177. June 19 Memorandum, *supra* note 172, at 6, *quoted in* CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10, manuscript at 605.

178. *Wickard*, 317 U.S. at 113.

Filburn, Jackson announced that "questions of the power of Congress [under the Commerce Clause] are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect.'"[179] Such questions should focus on "the actual effects of the activity in question upon interstate commerce."[180] To clarify any doubts about the turn in the Court's Commerce Clause jurisprudence, he went on:

> The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause . . . has made the mechanical application of legal formulas no longer feasible . . . .
>
> [E]ven if [an] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."[181]

Jackson's opinion also made it plain that the "substantiality" of the effect of an activity on interstate commerce was not a matter for the Court to decide. He said of the *Wickard* case, "[t]his record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."[182] And that was all that was necessary to sustain the statute:

> The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do.[183]

It seems fair to say that despite doctrinal radiations, *Wickard v. Filburn* was not a Commerce Clause analog to *Parrish*. *Parrish* had retained the categories of police powers/Due Process Clause jurisprudence, even though undermining them, and had appeared to anticipate a continued role for the Court as a scrutinizer of legislative interference with employment relationships, even though wages or hours legislation has never been invalidated since the decision came down. *Wickard*, however, completely destroyed the edifice of traditional Commerce Clause jurisprudence.

179. *Id.* at 120.
180. *Id.*
181. *Id.* at 123-25.
182. *Id.* at 128-29.
183. *Id.* at 129.

Jackson's opinion explicitly stated that the reach of the commerce power would be determined by "economic effects" rather than "legal formulas."[184] At the same time it announced that "[t]he conflicts of economic interest" that might precipitate Congressional regulation of business activities were not subjects of judicial inquiry.[185] The role of the courts to police the boundary between the "national" and "local" spheres of the realm of political economy had been abandoned. An interpretive revolution had taken place. The "living Constitution" rubric had been internalized by the Court.

III. Adaptivity, The Constitutional Revolution, and the Triumph of Modernist Consciousness

How could the Court write an opinion such as *Wickard*, handed down only five years after Sutherland's dissent in *Parrish*? A conventional explanation of the "constitutional revolution" of the late 1930s and 1940s associates that "revolution" with the dramatic triumph of Roosevelt in the election of 1936, the introduction of the "Court-packing" plan in early 1937, and the allegedly politically-motivated "switch" of the Court that resulted in the overruling of *Adkins* and the sanctioning of minimum wage and maximum hours legislation.[186]

However, we can take for granted that the conventional explanation has been largely discredited.[187] In some versions, it violates elementary principles of causation: the Court's "switch" in the minimum wage cases took place before the Court-packing plan was introduced, and the most significant changes in the Court's Commerce Clause jurisprudence took place after the Court-packing plan had failed. In addition, the explanation pays insufficient attention to the persistence of traditional, categorical modes of analysis in both the Court's Due Process and Commerce Clause cases throughout the 1930s. At the same time, the conventional explanation pays insufficient attention to the shift in the nature of constitutional interpretation heralded by decisions such as *Blaisdell*, handed down three years before the Court-packing plan.

Thus the challenge is to advance an explanation for the constitutional "revolution" that abandons the Court-packing crisis as a causative element. The place to start such an explanation is with a recapitulation of

184. *Id.* at 123-24.

185. *Id.* at 129.

186. *See* sources cited *supra* note 12.

187. *See* Cushman, *Rethinking the New Deal Court*, *supra* note 10, and citations therein; Friedman, *supra* note 12; Eben Moglen, *Toward a New Deal Legal History*, 80 VA. L. REV. 263 (1994); Edward A. Purcell, Jr., *Rethinking Constitutional Change*, 80 VA. L. REV. 277 (1994).

the Court's traditional constitutional jurisprudence in cases involving government regulation of the economy.[188] Building on that recapitulation, this Article has drawn a connection between the structure of the Court's traditional constitutional jurisprudence in the realm of political economy and the established nineteenth and early twentieth century interpretive role for Supreme Court justices in constitutional interpretation. That role presupposed the existence of preordained boundaries in the political economy realm and identified the justices as interpretive creators and guardians of those boundaries. Despite an ascribed judicial function of "pricking out" boundary lines, the role did not equate constitutional interpretation with "lawmaking" in the modern sense of that term.

Crucial to the juristic integrity of the system of orthodox constitutional jurisprudence was the traditional assumption of American republican thought that a "government of laws" was distinct from a "government of men," so that in policing the boundary between spheres, the judiciary was merely articulating and applying preexisting first principles of republican government. The traditional method of constitutional interpretation, set forth by Sutherland in his dissents in *Blaisdell* and *Parrish*, was based on that assumption.[189] The meaning of the Constitution did not fundamentally change with time, despite the application of constitutional principles to new cases, because the principles of republican government embedded in the Constitution were external to those who interpreted them. New conditions might produce new applications, but not new principles. If the principles of the Constitution compelled a politically or economically disadvantageous result, as in *Blaisdell*, the only remedy was to amend the Constitution. Adaptivity, in the world of constitutional interpretation, had a specialized, Marshallian meaning.

The emergence of the "living Constitution" theory of constitutional interpretation in the 1920s and 1930s was a signal that the set of epistemological assumptions that gave traditional constitutional jurisprudence its integrity was beginning to lose its status as an orthodoxy. The debate between constitutional theorists such as Beck on the one hand, and McBain or Corwin on the other, demonstrated that the premises of orthodox constitutionalism had been exposed and challenged.[190] "Back to the Constitution" meant a reaffirmation of those premises; the "living Constitution" model of interpretation was an effort to reveal their obsolescence.

The epistemological issue at the center of the debate over constitutional adaptivity was the locus of causation in the universe. The tradi-

188. A recapitulation advanced in detail in CUSHMAN, STRUCTURE OF A CONSTITUTIONAL REVOLUTION, *supra* note 10.

189. *See supra* notes 75-76, 147-49, and accompanying text.

190. *See supra* Part I.B.

tional theory of constitutional interpretation had been founded on a view of causation that attributed primary significance to forces external to human conduct. "Law" was taken to be one of those forces, at least in America, because it was conceived as a collection of principles that were prepolitical and essentialist, subject only to revision by "the people" at large. The essentialist principles of law included ones derived from the recognition of other omnipotent causal forces in the universe: the public/private distinction in the constitutional law of political economy, for example, was itself a product of the assumed incapacity of government to have any significant effect on the iron laws of economics.[191]

The emergence of the "living Constitution" theory of interpretation and the ultimate displacement of the orthodox view of adaptivity followed from the replacement of an epistemology of externally based causation with one that stressed the primacy of human will as a causal agent in the universe. A recognition of the capacity of humans to change their environment, to control their destiny, and to affect their future meant that purportedly essentialist legal principles, predicated on the inexorability of external forces, were not essentialist after all; they could be refashioned. Law could be "made" by humans; a government with laws could nonetheless be one of men.[192]

In the first two decades of the twentieth century, traditionalist constitutional jurisprudence remained in place with its integrated system of principles, doctrines, and distinctions. However, as new cases continued to place pressure on the system to "adapt," doctrines and distinctions became increasingly elaborated and refined to the point of appearing arcane. Meanwhile, critics such as Holmes began to attack doctrines such as "liberty of contract" or "business affected with a public interest" as judge-made rather than essentialist.[193] Of course, Holmes's critique was predicated on a modernist view of causal attribution in the universe; it also treated judicial lawmaking as both inevitable and dangerous in a constitutional democracy.[194]

191. The above paragraph is a summary of arguments I have made elsewhere. *See, e.g.*, White, *Canonization of Holmes and Brandeis*, *supra* note 19, at 580-85; White, *First Amendment Comes of Age*, *supra* note 18, at 311-27. For an earlier version of those arguments, *see* G. Edward White, *Recapturing New Deal Lawyers*, 102 HARV. L. REV. 489, 489-91 (1988) (book review).

192. By the 1930s, possibly even women: Frances Perkins joined the Roosevelt Administration as Secretary of Labor.

193. In addition to Holmes' *Adkins* dissent, *see supra* note 110, another example of this criticism can be found in his dissent to Tyson & Bros. v. Banton, 273 U.S. 418, 446 (1927), where he called the doctrine that a business was affected with a public interest "little more than a fiction intended to beautify what is disagreeable to the sufferers."

194. A dimension of the change in consciousness I am labeling modernist that will not receive extended discussion in this article is the shift from a republicanist to a democratist governing theory of American constitutionalism. Holmes simultaneously embraced both theories:

Through the 1930s, traditionalist constitutional jurisprudence continued to dominate the Supreme Court's approach to cases involving government and the economy, but adaptive pressure eventually resulted in substantial modification of standard traditionalist formulas and even some flirtations with a "living Constitution" approach to interpretation.[195] Then, suddenly, a newly composed Court jettisoned the formulas altogether, fully embraced Holmes's critique, and changed the meaning of adaptivity in constitutional interpretation. The central questions in Commerce Clause cases for this new Court majority were no longer whether a case fell within or without some formulaic distinction, such as "direct"/"indirect." They were whether an activity had some substantive economic effect on interstate commerce, and whether the judiciary should interfere with Congressional regulation of that activity if it did. After *Wickard,* the Court concluded that it would let Congress decide the first question, thereby resolving the second as well. It was adapting the Constitution in a radically different sense.[196]

In cases involving the realm of political economy, the dangers of constitutional interpretation were thus radically relocated after *Wickard.* In traditionalist constitutional jurisprudence, the dangers were that the judiciary would not police the public/private boundary sufficiently, thereby allowing legislatures to undermine fundamental principles of republican government. After *Wickard,* the dangers were that the judiciary would substitute one form of lawmaking instituted by judges in the guise of constitutional interpretation for another instituted by legislatures. In a world in which human-based causation dominated, lawmaking by judges raised problems of legitimacy in a democratic society. In a world dominated by external causation, judicial lawmaking was a contradiction in terms, and legislative lawmaking often raised problems of legitimacy.

Thus the constitutional revolution of the late 1930s and early 1940s was fundamentally an interpretive revolution, a revolution stemming from an altered consciousness, an altered epistemological sensibility. Why did it occur at that precise point in time? Here one must resist monocausal explanations. A variety of political, social, and economic pressures sur-

compare his opinion for the Court in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412-16 (1922), where he assumes the role of the judge enforcing first principles of republican government embodied in the Contract and Due Process Clauses, with his invocations of the majoritarian basis of the police power in cases such as Adkins v. Children's Hospital, 261 U.S. 525, 567-71 (1923). But Holmes, after all, was born in 1841. Many New Deal judges born late in the nineteenth or in the twentieth century, such as Frankfurter, Douglas, and Black, articulated a theory of constitutionalism firmly grounded in democratic theory and the premise of majority rule. *See* White, *First Amendment Comes of Age, supra* note 18, for a discussion of the emergence of democratist as distinguished from republicanist constitutionalism in the period between the two World Wars.

195. *See supra* Part I.C.

196. For an extended discussion of the ideas in the above paragraph, see *supra* Part II.

faced in American culture in the first three decades of the twentieth century, producing novel cases and putting pressure on the adaptive capacity of the doctrines and distinctions of traditionalist constitutional jurisprudence. And as that capacity was strained, the Holmesian critique began to take hold, centering on the argument that traditional doctrines and distinctions were not essentialist but judicially created.[197]

There was thus more pressure for the Constitution to function as a "living" document, and simultaneously, more Americans who had come to believe that it and all legal documents were necessarily "living." By 1942 and *Wickard*, only Stone and Roberts remained from the Court who had decided *Carter v. Carter Coal Co.*[198] The remaining justices were persons who had not only witnessed the economic and political dislocations associated with the New Deal, but had participated, directly or indirectly, in the federal government's efforts to fashion a legislative response to those dislocations. Their working experience appeared to confirm the modernist proposition that humans could control their immediate environment rather than being fated to endure it.

Rather than seeing the constitutional revolution of the New Deal as a product of the Court-packing crisis, it is more profitable to think of the Court-packing crisis as a product of a constitutional revolution, one whose "revolutionary" features were, at bottom, epistemologically cen-

197. This Article is not the place to develop an extensive historical explanation for why the interpretive "revolution" emerged when it did, namely in the first three decades of the twentieth century. I will develop that explanation in my forthcoming book.

At this point, however, I might sketch out the principal variables that in my judgment interacted to produce conditions favorable for the emergence of the "revolution" in that time period. One variable I have already described in some detail: the emergence to a position of influence, and then of juristic orthodoxy, of the set of epistemological assumptions I have identified with "modernist" jurisprudence. The emergence of those assumptions was a necessary but not a sufficient condition for the "revolution's" emergence between approximately 1900 and 1930. At least three "cataclysmic events" in the realm of American political economy should also be given prominence; my hypothesis is that the "revolution" appeared at the time it did because of a complex interaction between the assumptions of modernist epistemology and those events. In chronological order, those events were a widening gulf, and the associated perception of that gulf, between the economic wealth, status, and power of elites and nonelites in American society between the 1870s and the dawning of the twentieth century; the cultural dislocations fostered by World War I and its immediate aftermath; and the "Great Depression" of the early 1930s, whose symbolic event was the "crash" of the stock market in October 1929. In my view, those "cataclysmic events" both facilitated and were given special meaning by modernist epistemology after the 1930s. The result was a "revolution" in American attitudes toward governance, which included a new attitude toward constitutional adaptivity.

198. 298 U.S. 238 (1936). In *Carter Coal*, the Court invalidated the Bituminous Coal Conservation Act of 1935, a comprehensive New Deal regulatory scheme intended to stabilize the coal industry, on the ground that it was an unconstitutional extension of the federal government's power to regulate "commerce."

tered. By assuming that the Supreme Court of the United States could be "packed" with persons who would be sympathetic to the political goals of the Roosevelt Administrations, and who would translate that sympathy into constitutional doctrine, the proponents of Court-packing were taking as a given that America was a government of men. Theirs was a modernist, "living" view of constitutional theory. They had come through the crisis of adaptivity on the winning side.